LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAY 14 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 1001

JOHN S. CARLI,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

DOMINIC H. FRINZI,
Counsel for Petitioner,
152 West Wisconsin Avenue,
Milwaukee 3, Wisconsin.

HAMMERSMITH-KORTMEYER CO.
MILWAUKEE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No.

JOHN S. CARLI,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

---

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, John S. Carli prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin, in this case.

OPINIONS BELOW

The first memorandum opinion of the Circuit Court of Iron County, Wisconsin (Appendix B, infra, pp. 8-14) is not officially reported.

The second memorandum opinion of the Circuit Court of Iron County, Wisconsin (Appendix B, infra, pp. 15-18) is not officially reported. The opinion of the Supreme Court of the State of Wisconsin (Appendix B, infra, pp. 20-33) is reported at 2 Wis. (2d) Advance Sheets 429.

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin was entered on December 3, 1957. (Appendix B, infra, pp. 19-20).

Rehearing was denied on February 4, 1958. (Appendix B, infra, p. 31). On May 1, 1958 the time within which to file a petition for a Writ of Certiorari was extended, by an order of Mr. Justice Clark, to May 15, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether the act of the trial court finding petitioner guilty on May 15, 1956 without his presence constituted a violation of petitioner's rights under the 14th Amendment.

2. Whether the act of the trial court verbally requesting a presentence investigation and the receiving of a confidential communication from an agent of the Wisconsin Department of Public Welfare prior to a finding of guilt of the petitioner constituted a violation of the 14th Amendment and Rule 32(c)(1) of the Federal Rules of Criminal Procedure.

RULES INVOLVED

Federal Rules of Criminal Procedure:

Rule 32. Sentence and Judgment.

(c) Presentence Investigation.

(1) When Made. The probation service of the court should make a presentence investigation and report to the court before the imposition of sentence or the granting of probation, unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

STATEMENT

The facts as found by the Circuit Court of Iron County, Wisconsin (Appendix B, infra, p. 8) may be summarized as follows: the petitioner was tried to the court on the 14th and 15th days of March, 1956 upon two counts, to-wit, maim and attempt to maim in violation of Section 340.35 Wisconsin Statutes. To these charges the petitioner pled not guilty.

On or about the 15th day of May, 1956 the Circuit Court concluded in the absence of the petitioner, that he was guilty. (Appendix B, infra, p. 17).

The Circuit Court after dictating and transcribing said memorandum opinion (Appendix B, infra, p. 17) verbally requested Joseph Moran of the Wisconsin State Department of Public Welfare to make a presentence investigation. Said Joseph Moran made the investigation and mailed it to the Circuit Court as a confidential communication.

The Circuit Court's memorandum opinion of May 15, 1956 was not filed until June 26, 1956. On June 26, 1956 the court formally found petitioner guilty.

The facts as found by the Supreme Court of the State of Wisconsin in the motion for rehearing are as follows: (Appendix B, infra, p. 32) the trial closed March 15, 1956. Sentence was imposed at Hurley, Wisconsin on June 26, 1956. The presentence investigation had been made and the report submitted before that date. The petitioner did not consent to the finding of guilt in his absence (Appendix B, infra, pp. 32-33).

REASONS FOR GRANTING THE WRIT

The decision of the Wisconsin Supreme Court that the petitioner's right to be present at all stages of the trial was not violated when the trial court found him guilty without his presence is clearly contrary to the law. In *Hopt v. Utah,* 110 U.S. 574 it was held that nonpresence of the defendant during the challenges of proposed jurors violated his right. In the Hopt case the applicable Utah statute was virtually identical with Sec. 357.07 (1953) Wisconsin Statutes.

> "357.07 Defendant to be present. A defendant accused of a felony shall be personally present during the trial. A defendant accused of a misdemeanor may at his written request and by leave of court be tried in his absence if represented by his attorney duly authorized for that purpose."

The decision below is in conflict with *Crain v. United States,* 162 U.S. 625.

It is also out of harmony with *United States v. Campanaro,* 63 Fed. Supp. 811, at 812 et. seq. In that case the testimony of a government witness which referred to

contents of a certain record was held prejudicially inadmissible because it proved the fact of the matter, not the fact of the statement, thereby denying the defendant his right to cross-examine.

Furthermore in *Chessman v. Teets*, 354 U.S. 156 it was held,

> "that the ex parte settlement of this state court record violated petitioner's constitutional right to procedural due process. We think the petitioner was entitled to be represented throughout those proceedings either in person or by counsel (cases cited)."

In the present case petitioner's rights were violated because he was not present at the time the court found him guilty and made an ex parte request for a confidential communication. Furthermore, if this communication contained statements to prove the fact of petitioner's alleged guilt then petitioner was denied his right to cross-examine. The Circuit Court's formal finding of guilt on June 26, 1956 in the presence of petitioner was a denial of due process.

CONCLUSION

This petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DOMINIC H. FRINZI,
Counsel for Petitioner,
152 West Wisconsin Avenue,
Milwaukee 3, Wisconsin.

May, 1958

APPENDIX A

EXHIBIT E

STATE OF WISCONSIN
vs.
JOHN S. CARLI,

George Sullivan,
District Attorney,
Robert J. Beaudry,
Defendant's Attorney
Lewis J. Charles,
Presiding Judge,
Hon. Carl H. Daley,
Presiding Judge.

July 11—1955 Returns from County Court filed
Defendant remanded to custory of the sheriff
July 11—1955 Bail Bond—Withdrawn on Nov. 22—1955 and filed
Nov. 23—1955 Information filed
Nov. 25—1955 Bail Bond filed
Dec. 5—1955 Affidavit of Prejudice filed
Dec. 23—1955 Disqualification filed
Dec. 23—1955 Order of Appointment filed
Mar. 15—1956 Affidavit filed
Mar. 15—1956 Motion filed
Mar. 15—1956 Defendant's Brief in Support of His First Motion filed
Mar. 15—1956 Defendant's Brief in Support of His Second Motion filed
Mar. 15—1956 Exhibit List and Exhibits filed
June 26—1956 Pre-Sentence Investigation Returned to Judge Daley 7-5-56 filed
June 26—1956 Memorandum Opinion filed
June 26—1956 Sentence and Certificate filed
July 2—1956 Transcript of Testimony for June 26, Hearing filed
July 2—1956 Court Reporter's Statement for transcript
July 9—1956 File Certified to Douglas County

APPENDIX B

State of Wisconsin, In Circuit Court, for Iron County

STATE OF WISCONSIN
Plaintiff,

vs.

JOHN S. CARLI,
Defendant.

MEMORANDUM OPINION

The above entitled case was tried to the Court pursuant to an agreement between the parties on the 14th and 15th days of March, 1956 at Hurley, Wisconsin. The State was represented by George Sullivan, and the Defendant by Robert J. Beaudry of Milwaukee, Wisconsin.

The Information was based upon two counts, to-wit: the maiming of one John Garber by biting off his ear in violation of Section 340.35 of the Wisconsin Statutes, and the second count charging an attempt by said defendant to maim John Garber by biting off his ear in accordance with the terms of Section 340.35 of the Wisconsin Statutes and in violation of Section 340.36 of the Wisconsin Statutes. To these charges the defendant pled not guilty and a trial was had before the Court.

John Garber, who will hereafter be referred to as Garber, went into the Club Bowery operated by the defendant on December 17, 1954 somewhere about 10:00 o'clock in the evening. He stated he went into the Bowery to see a musician to get him to play at the Gateway on New Years Eve. That he sat on a stool for sometime and then

the defendant swung at him and knocked him off the stool. That when he, Garber got up, he was hemmed in by Fred Carli, uncle of the defendant, and one, Harris, and they all went to the floor, and that John Carli fell on top of him. He testified he did not know whether Harris was helping him or the Carlis. That John Carli hit him and while they were on the floor, John Carli was on top of him and chewed off his ear. That when he arose, he was being held and pushed out of the door and into a storm-shed by Fred and John. Later that evening, he went to Doctor Gertz who treated him and he was in the hospital for a day or two.

Ruth Moro had testified in the preliminary hearing and at that time testified she had seen John Carli bite off the ear of said Garber, and that part of the ear bit off was picked up off the floor and thrown behind a music box, and that John Carli had stated that night that he had bit John Garber's ear off. After the preliminary examination, and before the trial in question, said Ruth Moro had been working for said John Carli taking care of his children for room and board, but received no salary. She states she came to the trial with John Carli. In this trial, Ruth Moro had switched her testimony and was hostile to the State and stated that John Garber had hit Carli first and that he did not bite his ear, and that he did not state that night that he, John Carli, had bit off the ear of Garber. She claimed she testified in the first hearing the manner in which she did because she was afraid the District Attorney would do something to her regarding her divorce or the custody of the children. Ruth Moro is not a very reliable witness and we are of the opinion that her testimony at this trial is not entitled to any credibility because she is an admitted perjure. If anything, her testimony at the preliminary hearing was

probably the truth and would be entitled to more credibility than the testimony given at this trial.

John Carli denied that he bit off Garber's ear and stated that Garber was the aggressor. Carl Williams, who worked for John Carli at the Bowery, stated he was there the night in question, saw Garber come in and heard some talking and laughing, and that Garber swung at Carli and there was a mixup, but that is all that he saw. He testified he did not know about Garber losing the ear until the next day and he did not hear John Carli say he had bit off Garber's ear. Fred Carli also testified in behalf of the defendant and stated he was an uncle of the defendant and worked at the Club Bowery, and there was some kind of an argument whether Garber had paid for a drink, and that then there was a mixup. He stated he did not know about Garber's ear being missing until the next day and he denied that on the night in question, he picked up the missing part of the ear and showed it with the use of a flashlight.

Leo Negrini, the Chief of Police who served the warrant on John Carli which was probably the next day, stated that John said, "Leave Harris and Fred Carli out of this"; that "the trouble was between Garber and myself." John Shea testified that he was with the Chief when John Carli was arrested, and that Carli said, "Leave Harris and Fred out of it," and that at the time, John's wife was in the car and she said to John, "You were not downstairs when it happened," and John Carli said to her, "Do you want the others to take the rap?" John Walencik testified in substance that he knew John Carli, used to work for him, that he talked to John Carli a short time after Garber was assaulted, and that John told him how he could make $50.00, and that when Walencik asked him how, John said they could rehearse the case

and that Walencik would testify that he saw it and testify in Carli's favor. That Walencik told Carli he did not see it and could not testify. James Francis also testified that sometime after the assault that John Carli asked him to see Garber and ask him if the matter could be settled for the sum of $2500.00 at the rate of $200.00 per month. Mrs. Penny Carli, the wife of the defendant, went to see Garber in the hospital and she told Garber that if her husband bit off his ear, they would give him anything, and that Garber said if he did anything, he would talk to her first.

There was some testimony by Anna Thompson that Garber was in the French Casino where she danced and sang on the night in question, and that Garber bought her fourteen or fifteen drinks of Scotch and drank the same amount with her. John Rajkovich stated that at the time in question, he operated the French Casino, and remembered Garber being in there, but could not swear whether it was the 15th or the 17th or the 18th day of December, 1954. He stated that when Garber was in there, he went with Garber to the Hi Hat and had a couple of drinks there. One Lynne Howell stated that Garber was in the Hi Hat on the 17th and he had six or seven scotches and was intoxicated. The two witnesses just mentioned also stated that Garber was intoxicated. Lynne Howell also testified that she had come to the hearing with John Carli and was at the present time living in Chicago and was not living with her husband. John Garber testified he was not in the French Casino on the 17th, or in the Hi Hat on the 17th, but that he was in them on the 15th. Anna Thompson stated she thought it was the 17th but did not appear very positive. John Rajkovich, the owner of the French Casino, stated he could not say for sure that it was the 17th or the 15th. This was the same night that

he was in the Hi Hat. If it is material to the decision of this case as to whether Garber was drunk and had some 23 or 24 drinks of scotch on the night in question, this is not very positive evidence, as two of the witnesses were not very positive and said they thought it was the 17th, and the other witness, the owner, said he could not swear whether it was the 15th or the 17th. John Garber stated he was at the French Casino and Hi Hat on the 15th, and Mrs. Blanche Lawless and her husband testified that John Garber was in the Congress Bar which they operated, and which was close to the other places mentioned, about 9:00 o'clock on the evening in question. This was between a half hour and an hour before the assault in question took place. They testified that Garber had one drink in their place and that he was sober. These two witnesses appeared to be telling the truth and had no interest in the outcome of the case, and it seems to us their testimony is entitled to a great deal of credibility. If their testimony is true, it would be hard to figure how, that between the time Garber was in the Congress Bar and the time of the assault, he could drink some 23 or 24 scotches and still be able to navigate in an erect position at all. It seems to us the better logic is that John Garber was probably in the French Casino and the Hi Hat on the 15th when he so stated.

John Carli testified that he made an attempt to settle the case with Garber because there was a conspiracy against him, and the Mayor, or District Attorney, or other law enforcement officials were trying to get his liquor license and because of this conspiracy, he wanted to settle the affair with Garber so as to, "Take off the heat," as he expressed it. It seems to us that there is sufficient credible evidence to establish the guilt of the defendant of the offense of assault with intent to do great bodily harm be-

yond a reasonable doubt. Garber's testimony was positive that John Carli bit off his ear. Ruth Moro testified both ways and it seems to us, the conduct of Carli, after the assault, in attempting to settle the affair, in talking to Walencik who used to work for him, and to Francis, and the statements he made to the Sheriff and the Chief of Police, that Harris and his Uncle, Fred Carli were to be left out of it as it was between himself and Garber, would indicate that he was guilty. There is no dispute but that Garber lost a part of his ear in this fight, and there is positive testimony that John Carli was the one that bit off the ear. Witnesses who testified on his behalf, testified that there was a fight on the night in question, but stated they did not know that Garber lost his ear until the next day. It seems to us that we can infer from the testimony that anyone who was in the place on the night in question, could not help but know that Garber's ear or a portion of it had been bitten off.

We do not think there is sufficient evidence to hold the defendant guilty of maim, or attempted maim, but we do think there is ample evidence to hold that the defendant is guilty of assault with intent to do great bodily harm beyond a reasonable doubt.

It may be claimed that the defendant is not guilty beyond a reasonable doubt because there is no proof of intent. It is not possible in cases like this to look inside of a person's head to determine just what intent was in his mind. We have to infer that intent from the nature of the actions and conduct of the defendant at the time of the assault. We think there is ample evidence to establish, beyond a reasonable doubt, the intent of the defendant.

This subject is discussed in the case of State vs. Vinson, 269 Wis. 305, and in this case, the Court quotes some

language of Judge Wickham from another case as follows:

> " * * * intent is a state of mind which can be evidenced only by words or conduct of the person who is claimed to have entertained it. The Jury was under no obligation to accept the direct evidence of intent furnished by the defendant, and must be permitted to infer intent from such of defendant's acts as objectively evidenced his state of mind."

We have held that according to evidence beyond reasonable doubt that John Carli did chew off a portion of the ear of Garber. If he did this, we do not see how he can then maintain that he did not intend to do so, especially when you take into consideration the other credible evidence and circumstances.

We are therefore of the opinion that the defendant, John Carli, is guilty of assault with intent to do great bodily harm.

Dated this 26 day of June, 1956.

By the Court:

/s/ Carl H. Daley
Circuit Judge

State of Wisconsin, In Circuit Court, for Iron County

STATE OF WISCONSIN
Plaintiff,

vs.

JOHN S. CARLI,
Defendant.

SECOND MEMORANDUM OPINION

This case was tried to the Court and the defendant was found guilty and sentenced to not less than one nor more than one year in the Wisconsin State Prison at Waupun, Wisconsin for assault with intent to do great bodily harm. The case was tried on March 14th and 15th, and the defendant was found guilty and sentence imposed on June 26, 1956.

Thereafter the defendant procured an order requiring the State to show cause why the judgment of guilty and sentence should not be set aside for the customary reasons, which order was returnable on the 12th day of July, 1956, but had to be adjourned until the 24th day of July, 1956 because service was not made upon the State. The defendant, in his affidavit in the first place, claims that he was entitled to a speedy trial, and because of the delay in bringing the matter to trial, the verdict should be set aside, or the judgment and sentence should be set aside. The Court is not familiar with what happened in this case prior to December, 1955. However, from the record it appears that the defendant filed an affidavit of prejudice against Judge Charles, the presiding judge in the circuit, who then requested the undersigned, who at the time was Chairman of the Board of Circuit Judges, to procure someone to try the case. That the undersigned contacted some eight or ten judges but could not get anyone to go to Hurley to try the case. That thereafter, sometime in

the latter part of December, 1955, or first of January, 1956, the undersigned agreed to try the case. That there was trials pending in the Eleventh Judicial Circuit and the undersigned first disposed of those and got over to Hurley to try the case as soon as possible which was the 14th and 15th of March, 1956.

That on said 15th of March, at the conclusion of the trial, each party was granted time for briefs and reply. The State was granted twenty days in which to file a brief on the law and the facts, and the defendant was granted twenty days in which to file a rebuttal affidavit. That the defendant stated in his affidavit that at said time, he demanded an immediate judgment and sentence. But the record of the Court Reporter does not indicate that any such demand was made. That thereafter the undersigned had to complete the regular jury terms in the Eleventh Judicial Circuit and had to try cases for Judge White at Ellsworth, Wisconsin, and for Judge Rinehard at Chippewa Falls, Wisconsin, which the undersigned had agreed to do prior to going back to Hurley for the judgment and sentencing being imposed. That as soon as said cases were completed, the Court went to Hurley and pronounced judgment and imposed sentence. That if there was any delay, it was caused by defendant filing the affidavit of prejudice which, of course, he had a right to do. But either he or his attorney should know that in such a case, it causes delay.

The defendant in his affidavit states, that the Court, on or about the 15th of May, entered an ex parte order for a pre-sentence investigation by the Wisconsin State Department of Public Welfare. That no such order was entered.

That on or about the 15th day of May, after the briefs had been submitted by counsel, the Court came to the con-

clusion that on the evidence produced at the trial, that the defendant was guilty and that the circumstances of the case required a prison sentence. That on said 15th day of May, 1956, the Court dictated to the Court Reporter a memorandum opinion which said Court Reporter transcribed on said 15th day of May. That said memorandum opinion which is now on file is the identical opinion which was dictated and transcribed on said 15th day of May. That the same is identical in all respects except that on the 26th day of June, 1956, the Court signed and dated and filed said memorandum opinion.

That sometime after the dictating and transcribing of said memorandum opinion, the Court verbally requested Joseph Moran, agent of the Wisconsin State Department of Public Welfare, to make a pre-sentence investigation. That as the undersigned is informed and verily believed, said Joseph Moran made said investigation which was mailed to the Court and was a confidential communication to said Court. That the reason for requesting the pre-sentence investigation was so that it would not be necessary for the defendant to appear at Hurley for pronouncement of judgment and then have a pre-sentence investigation ordered and the defendant have to make an additional trip from Milwaukee. That an additional reason for having said pre-sentence investigation made was to see if there were any facts not within the knowledge of the Court which would cause the Court to change its mind on the question of a prison sentence, and to see if the State Department of Public Welfare would recommend probation.

The pre-sentence investigation which was made contained no facts which caused the Court to change its mind on the question of a prison sentence, and the State Department of Public Welfare did not recommend probation.

That at the time of the July 24th hearing, the defendant furnished additional affidavits criticizing in detail the Court's memorandum opinion, containing numerous exhibits and transcripts of testimony and correspondence which the Court is of the opinion are not material at this stage of the proceedings, said exhibits including such matters as letters from attorneys in Michigan, transcripts of testimony from other hearings etc. At this point the Court is not inclined to make an analysis of all the matters that the defendant finds wrong with the Court's memorandum opinion. In this case, there was an attempt to try the Chief of Police, the Mayor and the District Attorney. The Court has no knowledge of such matters nor what the background of the same is. However, the defendant was not permitted to try all of these parties as the Court was of the opinion the defendant was the party being tried. From the numerous affidavits and statements on file in connection with this order after sentence, apparently the defendant is now trying to try the Court.

This Court is of the opinion the same as it was on May 15, 1956 when it dictated its memorandum opinion, that there is ample credible testimony to sustain the judgment which found the defendant guilty beyond a reasonable doubt of assault with intent to do great bodily harm. What is important is what transpired at the trial and whether the testimony is sufficient to warrant the judgment and sentence imposed. All else is a mere smoke screen in attempting to evade the judgment and sentence imposed. The Court is of the opinion that the motions of the defendant should be and the same are hereby denied.

Dated this 3rd day of August, 1956.

By the Court:

/s/ Carl H. Daley

Circuit Judge

State of Wisconsin, In Supreme Court

On the 8th day of November, 1957, the following proceedings were had:

No. St. 9, August 1957 Term.

STATE OF WISCONSIN,
Respondent,
v.
JOHN S. CARLI,
Appellant.

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Joseph E. Tierney, Esq., for the said appellant, and by William A. Platz, Esq., Assistant Attorney General, and George Sullivan, Esq., District Attorney of Iron County, for the said respondent, and submitted, and the Court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

State of Wisconsin, In Supreme Court

On the 3rd day of December, 1957, the following proceedings were had:

No. St. 9, August 1957 Term.

STATE OF WISCONSIN,
Respondent,
v.
JOHN S. CARLI,
Appellant.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Iron County, and was

argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Iron County, in this cause, be, and the same is hereby, affirmed.

Chief Justice Martin took no part.

No. St. 9, August Term 1957

State of Wisconsin: In Supreme Court

STATE OF WISCONSIN,
Respondent,

v.

JOHN S. CARLI,
Appellant.

Appeal from a judgment of the circuit court for Iron county: Carl H. Daley, Circuit Judge presiding.

Affirmed.

Defendant, John Carli, was charged with mayhem and attempted mayhem by biting off a portion of the ear of John Garber. The court found defendant guilty of assault with intent to do great bodily harm.

On the evening of December 17, 1954, John Garber, manager of Kings Gateway Hotel, Land O' Lakes, visited the Bowery Club at Hurley. Defendant was the operator. There was a fight in which Garber, defendant, Fred Carli and Red Harris were involved. Fred Carli is defendant's uncle and both he and Harris were defendant's bartenders. After the fight Garber left with blood on his face. He went across the street to the Club Francis, cleaned up and asked for help in getting to a doctor. He was taken to a doctor's office in Ironwood, Michigan and thence to a hospital.

The doctor found that a portion of the pinna or flap of Garber's right ear was missing. From about ½ inch below the superior curve of the ear all the ear was taken off down to about half of the lower lobe. It was the doctor's opinion that the wound could have been caused by repeated biting. Pictures of the cropped ear were in evidence.

So much was undisputed. Garber testified that he bought a drink at the bar and paid for it; that defendant came up to him and said in effect, "You came in here looking for something or somebody, but you are not going to get it;" defendant then knocked Garber to the floor; Fred and Harris became involved. Garber was not sure whose side Harris was on, but Fred held Garber while defendant lay on top of him and chewed on his ear; the Carlis pushed Garber out into a vestibule; defendant held him there and used a lot of abusive language and finally let him go. Besides the bitten ear, Garber had a black eye, lacerations over his ear and various bruises.

Defendant testified that he noticed Garber sitting at the bar and talking to Fred or Harris and one or two girls. Fred complained to defendant that Garber was refusing to pay for drinks; defendant then talked to Garber and Garber refused to pay for drinks for the girls; defendant told him to pay for his own and then patronize some other establishment; Garber hit defendant and knocked him back against a service bar and defendant did not remember anything for several minutes. When he came to, he saw Harris, Fred and Garber in a fracas on the floor. Defendant broke it up and offered to let Garber use the bathroom to clean up the blood that was on him. Defendant denied hitting Garber and biting his ear.

There were other points in dispute: whether Garber had come to the Bowery that evening for the purpose of engaging one of the musicians to play at the Gateway on New Year's Eve or whether he had concluded that arrangement and obtained defendant's consent on a visit two nights before; whether Garber was sober or very drunk; whether it was the night of the fight that Garber had drunk some 14 or 15 shots of scotch with one of the hostesses at the French Casino and then had 7 more at the Hi Hat or whether his visits to those places had been December 15; whether Garber truthfully testified that during the afternoon preceding the fight he had been in a barbershop, paid a visit to his sister, looked over some property and spent half an hour in church.

The Bowery Club had a stage for entertainment. There were a three-piece band and a mistress of ceremonies. The band continued to play during the fracas and the drummer testified "It is tradition for a band to keep playing." Two entertainers named Baby Lee Parker and Stormy Weather were also present. The drummer and Fred Carli, both gave testimony which corroborated that of defendant.

A waitress, who had testified at the preliminary that she had seen defendant biting Garber's ear and later heard him brag that he had bitten it off, denied these things at the trial. She had been working for some months in defendant's household. She testified on both occasions, however, that she saw Fred pick up a portion of an ear after the fight, although all the other defense witnesses who had been present, claimed that they did not know anything about Garber losing any part of his ear.

On December 18, 1954, warrants were issued for the Carlis and Harris. The chief of police and the sheriff

arrested defendant and asked where the others were. Defendant said "Leave them out of it. This was between Garber and I." Later Mrs. John Carli told her husband in the officer's presence that he wasn't even there at the time and defendant said, "I can't leave them take the blame for me."

John Walencik testified that defendant offered him $50 to say he had seen the fight. When Walencik said he didn't know anything about it, defendant said, "We can rehearse the case."

It is conceded that defendant asked James Francis to try to induce Garber to accept $2500 to settle "these differences." Defendant's explanation was that shortly after the affair about five tavernkeepers met at the bedside of an esteemed friend who "fell down drunk or something and hurt his back." The subject of conversation was how to get the town "reopened" because right after the Garber affair, the mayor had closed the town at 1:00 o'clock. Defendant said that the mayor did that to make the defendant look worse in the eyes of the public. The tavernkeepers were worrying how they were going to make any money over Christmas and New Years with that state of affairs. Somebody mentioned that if they could get together and pay for Garber's ear, the incident would be forgotten. Arrangements were made for defendant to borrow $2500 to make payment.

Mrs. Carli called on Garber while he was in the hospital and told him that if her husband bit off his ear, they would do anything he wanted but they did not want to lose their business because of it

On June 26, 1956, the court found defendant guilty of assault with intent to do great bodily harm and sentenced

him to imprisonment for not more nor less than 1 year. Defendant appealed.

Other material facts will be referred to in the opinion.

FAIRCHILD, J.

1. *Sufficiency of evidence.* Defendant argues that the evidence was insufficient to establish beyond reasonable doubt the offense of assault with intent to commit great bodily harm. He relies on the fact that the court did not find him guilty of mayhem or assault with intent to commit mayhem. Therefore, he says, the court entertained a reasonable doubt whether defendant bit Garber's ear. To the contrary, however, the circuit court made it crystal clear in its memorandum opinion that it determined "beyond a reasonable doubt that John Carli did chew off a portion of the ear of Garber." Apparently the court was not satisfied that the extent of the injury intended or inflicted was sufficient to qualify as mayhem.

It is clear from the statement of facts previously set forth that there were a number of conflicts in the testimony which were material only as they might affect credibility. The ear biting could not have been justified as self defense in these circumstances even if the court believed that Garber struck the first blow. There was a conflict on the central issue of whether defendant bit the ear. The court believed Garber's testimony that defendant did. We are satisfied that the extent of the injury is sufficient to constitute great bodily harm and that there was ample evidence that the injury was intentionally inflicted.

2. *Double Jeopardy.* The information contained two counts. The first charged mayhem by biting off a portion of the ear with malicious intent to maim and disfigure; the second charged an attempt to maim with intent to

tear off an ear with his teeth. Defendant maintains that he was placed in second jeopardy for the same offense when the trial court refused to find him guilty of mayhem or attempted mayhem and found him guilty of assault with intent to do great bodily harm.

The real question, as we see it, is whether assault with intent to do great bodily harm is a lesser offense than mayhem and included within it. If it is, then the defendant was at all times during his trial facing the lesser charge as well as the more inclusive ones set forth in the information, and he could properly be found guilty of the lesser offense where the court deemed that the greater had not been proved.

Sec. 340.35, Stats. 1953, provides in part as follows:

> "340.35 Mayhem. Any person with malicious intent to maim or disfigure, who shall * * * cut or tear off an ear * * * shall be punished by imprisonment in the state prison, not more than fifteen years nor less than one year, or by fine not exceeding five thousand dollars nor less than two hundred dollars."

Sec. 340.36, Stats. 1953, provides in part as follows:

> "340.36 Assault with intent to murder or maim. Any person who shall assault another with intent * * * to maim or disfigure his person in any of the ways mentioned in section 340.35, shall be punished by imprisonment in the state prison not more than five years nor less than one year, or by fine not exceeding one thousand dollars nor less than one hundred dollars."

Sec. 340.41, Stats. 1953, provides:

> "340.41 Assault, great bodily harm. Any person who shall assault another with intent to do great bodily harm shall be punished by imprisonment in the state prison not more than three years nor less

> than one year, or in the county jail not more than one year, or by fine not exceeding five hundred dollars nor less than one hundred dollars."

Clearly the information expressly charged defendant with crimes for which the maximum punishment was greater than for the offense of which he was convicted. In order to prove mayhem, as charged in the first count, the state must prove that defendant acted with malicious intent to maim or disfigure and that he cut or tore off Garber's ear. We are satisfied that the cutting or tearing off of an ear, or even the portion disclosed by the evidence here, constitutes great bodily harm. Thus if the State had successfully proved the offense charged in the first count, it would have proved every element of the offense of assault with intent to do great bodily harm. That is the test of whether an offense not expressly charged is included within the charge specifically set forth.

Defendant relies principally upon *Kilkelly v. State* (1878), 43 Wis. 604, — N.W. — . It was there held that an information charging assault with intent to murder did not include assault with intent to maim because the intent to maim is different in character from intent to murder. The *Kilkelly* decision was expressly modified, however, in *Birker v. State* (1903), 118 Wis. 108, 112, 94 N.W. 643. The court said:

> "The information in the present case charges that the plaintiff in error, being armed with a dangerous weapon, did make an assault upon another with intent to murder. The verdict declares him guilty of an assault with intent to do great bodily harm. All the elements of the offense charged are found, except the particular intent to murder, but that the accused had a different intent, namely, the intent to do great bodily harm. It seems that an assault with intent to murder must, from the very nature of the acts con-

stituting the offense, embrace an intent to do great bodily harm. It therefore follows that the offense of which plaintiff in error was convicted is necessarily included in the offense charged in the information, and we are of the opinion that the information, as presented, sustains the conviction of an assault with intent to do great bodily harm. This conclusion overrules the case of *State v. Yanta, supra,* and modifies the case of *Kilkelly v. State, supra,* insofar as it was made the basis of the decision in the *Yanta Case.*"

3. *Speedy Trial.* Defendant claims he was denied his constitutional right to a speedy trial. He was arrested December 18, 1954, and a preliminary hearing was had before the county court January 4, 1955. It resulted in an order binding defendant over to the circuit court for trial. Apparently defendant attacked the procedure and the circuit court dismissed the proceeding in May, although the record in this court does not contain the motion for, nor order of, dismissal.

Defendant was re-arrested May 16, 1955, and a preliminary hearing was had before the county court June 1, and time allowed thereafter for briefs. On June 21, the county court ordered defendant to appear for trial before the circuit court.

On November 23, 1955, the district attorney filed the information. On November 25, there was a hearing before the circuit court on a writ of habeas corpus, apparently grounded upon a claim that a speedy trial was being denied. The writ appears to have been quashed although the complete record of that proceeding is not before us.

The first regular term of circuit court for Iron county after June 21 began Monday, December 5, 1955, and on that day defendant filed an affidavit asserting prejudice on

the part of the circuit judge. Judge Charles made a prompt request of Judge Daley, then chairman of the board of circuit judges, for designation of another judge. Judge Daley contacted several judges, but was unable to find one available and designated himself. Because of matters pending in his own circuit, he could not try the case before March 14, 1956. Defendant was arraigned and trial began on that day.

Defendant moved for dismissal because he had been denied a speedy trial. He showed that his counsel had made several requests during the summer of 1955 that the district attorney file an information so that the depositions of certain witnesses who were traveling with a carnival could be taken. The motion for dismissal was denied.

Article I, sec. 7, Wis. Const., guarantees the accused a speedy trial. In *State v. Sawyer* (1952), 263 Wis. 218, 56 N.W. 2d. 811, this court indicated that a delay of two years between indictment and trial probably would violate a defendant's right to speedy trial if he demanded an earlier trial. No other Wisconsin case dealing with delay of a criminal trial has been cited to us. In 22 C.J.S., Criminal Law, sec. 467, p. 716, it is said, "One accused of crime is not entitled to a trial immediately on his arrest or accusation. He must wait until a regular term of the court having jurisdiction of the offense with which he is charged * * * Further, his right is not infringed by continuances in the discretion of the presiding judge, unless such discretion is arbitrarily exercised."

Defendant would, under sec. 955.01 (formerly 355.01), Stats., have been entitled to a discharge if not indicted or informed against before the end of 6 months after June 21, 1955. The information, however, was filed ap-

proximately 5 months after that date. The legislature, in enacting sec. 955.10 (formerly 355.10), Stats., impliedly approved a delay of trial until the next term of court even where the defendant is imprisoned, and where there is greater delay, that statute does not provide for discharge, but requires that defendant be bailed without sureties.

There is nothing in the record to suggest that the district attorney would not have brought defendant to trial at the regular term which began May 16, 1955, were it not for the dismissal because of some defect in the first preliminary. It may also be assumed that defendant would have been tried at the next term on December 5, or promptly thereafter but for defendant's filing an affidavit of prejudice. The delay thereafter until March 14, was not unreasonable in view of the necessity of fitting the trial into the schedule of a judge of another circuit.

Under the circumstances of this case we do not deem that defendant was deprived of a speedy trial.

4. *Compulsion of Witnesses.* Harris, Baby Lee Parker, H. Joe Starr, Stormy Weather and one other whose name does not appear, were in the Bowery Club at the time of the fight. Four of them had been interviewed by defendant's attorney shortly after the fight, although he never disclosed to the court the testimony he expected them to give. The five were with a carnival which, at the time of the preliminary in June, was in Rockford, Illinois, and which disbanded in November in Georgia. The district attorney declined to stipulate to the taking of their depositions when in Rockford.

Defendant claims that because the district attorney did not file the information until November 23, after the carnival disbanded, the state did not provide defendant with compulsory process to compel the attendance of wit-

nesses in his behalf. He points out that where witnesses are beyond the reach of process, as they apparently were in this case, the defendant is entitled to a commission for taking testimony by deposition even though the state be powerless to compel attendance. 14 Am. Jur., Criminal Law, sec. 163, p. 881. Wisconsin makes provision for a deposition in a criminal case, but only after filing of an indictment or information. Sec. 326.06, Stats. Therefore, defendant argues, the district attorney's delay in filing an information also delayed defendant's ability to take the depositions of these five witnesses until after defendant lost track of them.

It is regrettable that the district attorney did not file the information more promptly when requested to do so. Defendant has not shown, however, that the state's assistance in obtaining testimony has been refused.

Three and one-half months elapsed between the filing of the information and the trial. Defendant was then free to obtain authority for a deposition under sec. 326.06 if he could locate one or more of these witnesses. If he could not locate them, he could move for a continuance upon a proper showing. He did not so move, but kept demanding an early trial. He was neither denied the issuance of a subpoena nor the authority to take a deposition, nor was he forced to trial without such testimony in the face of a proper request for continuance.

In fairness to counsel representing defendant on this appeal, it should be noted that he was not defendant's counsel in the trial court.

By the Court. Judgment affirmed.

State of Wisconsin, In Supreme Court

On the 4th day of February, 1958, the following proceedings were had:

No. St. 9, August 1957 Term.

STATE OF WISCONSIN,
Respondent,
v.
JOHN S. CARLI,
Appellant.

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied without costs.

Memorandum opinion filed.

No. St. 9, August Term 1957

State of Wisconsin, In Supreme Court

STATE OF WISCONSIN,
Respondent,
v.
JOHN S. CARLI,
Appellant.

Fairchild, J. *On motion for rehearing.* Defendant asserts that he was deprived of the right to be confronted with the witnesses against him. Apparently he objects to the consideration by the circuit court of a report of a presentence investigation made at the court's request by the state department of public welfare. This proposition was

not considered in the opinion previously filed because it was not referred to either in the brief or on oral argument.

The trial closed March 15, 1956, except that time was allowed for submission of briefs, and sentence was imposed at Hurley on June 26. The pre-sentence investigation had been made and the report submitted to the court before that date. Defendant moved that the judgment be set aside challenging, among other things, the propriety of the court's consideration of the report. The court denied the motion, and filed a memorandum reciting the facts. These are not challenged by defendant and the memorandum makes it clear that the pre-sentence investigation was not requested or made until after the court's decision as to defendant's guilt had been dictated to the court reporter and transcribed, although not filed until June 26.

The court stated that he had handled the matter in this way "so that it would not be necessary for the defendant to appear at Hurley for pronouncement of judgment and then have a pre-sentence investigation ordered and the defendant have to make an additional trip from Milwaukee." He also stated that between March 15 and June 26, he was completing the regular jury terms in his own circuit and fulfilling previous commitments to try cases in two other circuits.

In relying upon the right of confrontation, defendant overlooks the distinction between the determination of guilt and the exercise of the court's discretion as to probation or extent of punishment. The right "to meet the witnesses face to face" guaranteed by Art. I, sec. 7, Wis. Const., and the standards of fair trial embraced within the concept of due process of law in the XIVth Amendment, U. S. Const., must be fully respected where the question for consideration is the guilt or innocence of the accused. Once the defendant has been found guilty,

he is "subject to whatever loss of liberty the legislature has prescribed for his crime." *State ex rel Volden v. Haas* (1953) 264 Wis. 127, 130, 58 N.W. 2d. 577. That consideration by the court of a confidential report of pre-sentence investigation does not violate a defendant's constitutional rights was settled for Wisconsin in the *Volden* case and settled with respect to the due process clause in *Williams v. New York* (1949) 337 U.S. 241.

There appears to be no express statutory provision for a pre-sentence investigation in the instant case. There was one in sec. 340.485, now 959.15, Stats., relating to sex crimes, considered in the *Volden* case. Other provisions are found in sec. 54.11, under the youth service act and sec. 57.025 relating to the municipal and district courts in Milwaukee county. But we view a request for a report, and consideration of it if available, as discretionary with the court, even in the absence of statute. The opinion in *Williams v. New York*, supra, contains a discussion of the theory and usefulness of pre-sentence procedure.

Fed. Rules Cr. Proc. rule 32(c) governs pre-sentence investigations and reports in United States courts. We note that it provides: "The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty." While it is clear in the instant case that the trial judge had made his determination of defendant's guilt before obtaining the report, and further that the judge avoided a burden for the defendant as well as for the court in not calling the defendant back to Hurley until the report had been made and the court was ready to pronounce sentence, it would ordinarily be better practice to make formal pronouncement of the finding of guilt before obtaining the report, at least in the absence of express consent by the defendant.

By the Court. Motion for rehearing denied.